

**The Protection Of Children in Armed Conflicts under the Rules of
International Law**

**Does International Humanitarian Law grant children special protection in
situations of attack?**



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Dedication

I dedicate this work to the unheard voices of scared children.

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Abbreviations

API	Protocol Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of International Armed Conflicts 8 June 1977
APII	Protocol Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of Non-International Armed Conflicts 8 June 1977
ECHR	European Convention of Human Rights 1950
ECtHR	European Court of Human Rights
FN	Footnote
GCI	Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field 12 August 1949 ("GC I")
GCII	Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 12 August 1949
GCIII	Geneva Convention (III) relative to the Treatment of Prisoners of War 12 August 1949
GCIV	Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War 12 August 1949
HagueReg	Convention respecting the Laws and Customs of War on Land 18 October 1907 (the Hague Regulations)
IAC	International Armed Conflict
IACtHR	Inter-American Court of Human Rights

ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICRC Commentary	International Committee of the Red Cross Commentaries to the Geneva Conventions and Additional Protocols.
ICRC Guidance	International Committee of the Red Cross Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law
ICRC Study	ICRC Customary IHL Database (see Bibliography for full citation)
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human rights law International armed conflict
IHL	International Humanitarian Law
NIAC	Non-international armed conflict
POW	Prisoner of War
Rome Statute	Statute of the International Criminal Court 1998
UDHR	Universal Declaration of Human Rights 1958
UN	United Nations
UNGA	United Nations General Assembly
UNSCR	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

CHAPTER ONE

1. General Overview of the Study

1.1 Introduction

During an armed conflict in 'Saphrop' region, reports provided to party 'Vestroia' indicate that a truck on territories under the control of the opposing party 'Kantomia' is seen carrying munitions and a group of school children not engaged in hostilities.

'Vestroia' is studying the legality of launching an attack on the truck under the rules of international humanitarian law (hereinafter IHL).

By focusing on the legal obligations of the party deciding to launch the attack, this study is an attempt to examine the legal status under IHL of the children on the truck and other situations of attacks on targets involving children. The thesis will also explore other relevant rules of International Human rights law (hereinafter IHRL) and International Criminal Law (hereinafter ICL) and how they apply and interrelate with IHL rules regarding the protection of children in situations of attack. The research aims to assess the effectiveness of the existing rules on the protection of children, rather than assessing to what extent they are respected.

The ultimate way to protect children from the effects of armed conflict would be to not engage in wars from the outset. This is unrealistic; therefore, there must be attempts to “better shield them from the worst”.¹

1.2 The Objective of the Study

The purpose of the study is to examine the existing legal regime on the protection of children in armed conflict and assess its effectiveness.

1.3 Relevance of the Study

Whereas IHL is a body of law presumed to grant children special protection,² children constitute about half of the civilian victims in armed conflicts.³ In the decade from 1986 to 1996, “an estimated two million children have been killed in armed conflicts”⁴ and 6 million have been permanently disabled or seriously injured.⁵ In many conflicts, millions of children are “not merely bystanders, but targets.”⁶ “The deliberate targeting of civilians, especially children,[...] continues to intensify.”⁷

1 Kuper, Jenny. *International Law Concerning Child Civilians in Armed Conflict*. (Oxford 1997). P. 244

2 See ICRC Legal Fact Sheet (28-02-2003) “Legal Protection of Children in Armed Conflict”, http://www.icrc.org/eng/assets/files/other/ang03_03_juridique_newlogo.pdf; and ICRC child protection adviser Kristin Barstad, <http://www.icrc.org/eng/resources/documents/interview/children-interview-171109.htm>.

3 UNICEF - Children in Conflict and Emergencies. Available at http://www.unicef.org/protection/index_armedconflict.html.

4 UN Doc.: A/51/306. 26 August 1996. *Impact of Armed Conflict on Children*. (Machel Study) Report of the expert of the Secretary-General Ms. Graca Machel. P.5. http://www.unicef.org/graca/a51-306_en.pdf; and *supra* fn.3.

5 *Ibid.*, p.5; and *Children in Conflict and Emergencies*, *supra* fn.3.

6 *Ibid.*, p.5.

7 Machel Study 10-year Strategic review. *Children and Conflict in a Changing World*, p.4. <http://www.unicef.org/tdad/machelreview.pdf>.

While this situation is partly a result of the violations of IHL rules, this does not preclude the need to examine the efficiency of the current protection regime and its vulnerability to abuse.⁸ The armed conflict in Afghanistan highlights this need. Statistics indicate that 151 children were killed in 2009 by regular armed forces,⁹ whose combatants are required to respect the laws of armed conflict. This case is one among other incidents which indicates the need to revise the adequacy of the existing standards.¹⁰

1.4 Clarification of Terminology

Unless otherwise indicated, the following terminology will be used:

“Children” refers to persons under the age of eighteen who have not been recruited by a belligerent party or used in taking direct participation in hostilities (hereinafter DPH).¹¹ These children are victims of war crimes

8 Despite their significance, the implementation and enforcement deficiencies of IHL rules are not dealt with in this study.

9 Special Representative of the Secretary-General for Children and Armed Conflict Radhika Coomaraswamy, in a press conference on 1 March 2010. Available at http://www.un.org/News/briefings/docs/2010/100301_Children.doc.htm [13.05.2011]

10 Other incidents confirm this assertion; e.g.(1) The allegedly mistaken killing by NATO helicopters of nine Afghan boys aged 9 to 15 while collecting firewood on 2 March 2011. http://www.nytimes.com/2011/03/03/world/asia/03afghan.html?_r=1;

(2) knowingly killing eleven children, ranging in age from 1-12 years old in their house in the Gaza Strip on 01 January 2009 as a result of an attack directed against their father, one of Hamas leaders Nizar Rian, amidst accusations of using children for shielding purposes (Gaza incident 2009). Available at http://www.btselem.org/english/gaza_strip/20090104_killing_of_nizar_rian_and_13_family_member.asp.

(3) The attack by an MNF-I helicopter against suspected insurgents in the village of Al-Nedawat, Dujala Province on 8 May 2007, which killed and injured six children in their school. The school was calculated as part of the collateral damage. In: Children and armed conflict Report of the Secretary-General. General Assembly Sixty-second session. 21 December 2007. http://www.un.org/ga/search/view_doc.asp?symbol=A/62/609&Lang=E. para57.

11 For the purposes of this thesis, “taking direct participation in hostilities” refers to the definition incorporated in The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC Guidance), adopted by the Assembly on the International Committee of the Red Cross on 26 February 2009, as: “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”, para1944.

and are subject to different rules of protection during the conduct of hostilities.¹²

“Unqualified protection” means protection that does not allow for exceptions even in special circumstances. Instances of unqualified protections in IHL include: the prohibitions on pillage,¹³ rape,¹⁴ the taking of hostages¹⁵ and the use of chemical weapons.¹⁶

“Qualified protection” refers to protection, which is not absolute under all circumstances; it is conditional, or allows for exceptions in certain circumstances, e.g. the protection of civilians during the conduct of hostilities in the case of a civilian directly participating in hostilities.¹⁷

“General protection” is provided to the entire civilian population including children during an armed conflict.

“Special protection” is accorded specifically to children.

12 Article 8(2)(b)(xxvi) and article 8(2)(e)(vii), Rome Statute of the International Criminal Court (Rome Statute). 17 July 1998, entered into force on 1 July 2002. State parties:139. State signatories:114.

13 Articles 28 and 47, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations). The Hague, 18 October 1907. Entered into force on 26.01.1910. State parties: 35. State signatories: 15. Article 33, GCIV; Article 4(2)(g), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII) of 8 June 1977; and Article 8(2)(b)(xvi), Rome Statute.

14 Article 14, Convention (III) relative to the Treatment of Prisoners of War. Geneva (GCIII), 12 August 1949. Entry into force: 21.10.1950. State parties: 194; article 27, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva (GCIV), 12 August 1949. Entered into force: 21.10.1950. States parties:194.

15 Articles 34 and 147, GCIV; Article 75(2)(c); art 4(2)(c), APII and rule 96, Henckaerts, J-M. and Doswald-Beck, L. Customary International Humanitarian Law Vol I Rules (ICRC Study). (Cambridge 2005). <http://www.icrc.org/web/eng/siteeng0.nsf/html/pcustom>.

16 Article 8(2)(b)(xviii), Rome Statute and rule 74, ICRC Study.

17 Article 51(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977. Entry into force: 07.12.1978. State parties: 170. State signatories:170. Not all Members of the Geneva Conventions are members in API. Nevertheless, many contend that several API and APII provisions are either declaratory or have crystallized customary rules and are thus binding even upon non-parties. See, e.g., Oerter, Stefan. “Methods and Means of Combat.” In: (Dieter Fleck eds. 1998). Second edition. The Handbook of Humanitarian Law in Armed Conflicts. (Pp. 119-235). Pp.122-123; Prosecutor v. Tadić, (Case no. IT-94-I-AR-72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995 (Tadić Case), The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), para 117; the ICRC Commentaries to the Geneva Conventions and Additional Protocols (Commentary) to API, p.628, para 1993.

“Situations of attack” are attacks on a target, whether a civilian object or a military objective, containing children or in the vicinity of children. “Attacks” in this sense “means acts of violence against the adversary, whether in offence or in defence.”¹⁸

“Targets involving children” refer to the presence of children within or in the vicinity of a target.

1.5 Scope and limitations

- **The age of children**

There is so far no shared understanding among States of the legal age when childhood ends. Variations exist when defining the age of majority:¹⁹ voting age, military age, criminal responsibility, but in general, the age of 18 “represents a continuing trend in the legal definition of “child.”²⁰

IHL treaties stipulate for different age-limits with respect to different protective measures for children, varying mostly between fifteen²¹ and eighteen.²² The Rome Statute of the International Criminal Court (hereinafter Rome Statute)²³ provides that the conscription, enlistment or

18 Article 49(1), API.

19 Goodwin-Gill, Guy and Ilene Cohn. *Child Soldiers: The Role of Children in Armed Conflicts*. (Oxford 1994). Pp 6-9; and Kuper (1997) pp. 7-10.

20 Pappas, Anna Mamalakis. “Introduction.” In: *Law and Status of the Child*. Vol.1. Pappas, A.M (New York 1983). Pp. xxvii-lv at p. xl: XL. Freeman confirms that “most developed countries currently draw the line at 18” between childhood and adulthood, but he emphasizes that this is arbitrary: Freeman, M.. *The Limits of Children’s Rights*. In (Freeman and Veerman eds.). *The Ideologies of Children’s Rights*. (Dordrecht 1992). (Pp. 29-46) at pp-34-35.

21 E.g. under GCIV: Article 24 concerning measures to ensure non separation of orphans and children from their; Article 38 requiring same preferential treatment for aliens as nationals; Article 50 on preferential measures with regard to food, medical care and protection adopted prior to occupation and Article 89 on additional food for interned children. On the minimum age for participation in hostilities and recruitment see Article 77, API and article 4, APII.

22 E.g. Article 68, GCIV regarding compulsion to work in occupied territory; article 77, API regarding execution of death penalty and article 6, APII on pronouncing death penalty.

23 Supra fn.12.

engaging in hostilities of children under the age of 15 is a war crime both in IAC²⁴ and NIAC.²⁵

Under the Convention on the Rights of the Child (hereinafter CRC), any human being under the age of 18 is a child.²⁶ In restraining the participation of children in armed conflicts, it changes the age limit to 15.²⁷ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (hereinafter Optional Protocol to CRC)²⁸ raises the minimum age for direct participation in hostilities to 18²⁹ and prohibits compulsory recruitment of anyone under 18 by government forces.³⁰ The Protocol calls on State Parties to raise the minimum age above 15 for voluntary recruitment.³¹ In the case of non-state armed groups, the treaty prohibits both voluntary and compulsory recruitment of persons under 18.³²

Taking into consideration the almost universal ratification of the CRC,³³ reflecting the prevailing view among States, a child -for the purpose of this study- is every human being below 18 years.³⁴

24 Article 8(2)(b) (xxvi), Rome Statute on situations of International Armed Conflict (IAC).

25 Article 8(2)(e) (vii), Rome Statute; on situations of Non-International Armed Conflict (NIAC).

26 Article 1, Convention on the Rights of the Child (CRC). Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entered into force 2 September 1990. State Signatories: 140. State Parties: 193.

27 Ibid., article 38; also see Kuper (1997), *supra* fn.1, pp. 102-103: the author indicates that the minimum age limit of 15 years for ensuring non direct participation in hostilities in art. 38(2), CRC is due to the lack of consensus in the drafting group between two views: raising the standard to the age of 18 or keeping inline with articles 77(3) of API and article 4(3)(c), APII.

28 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (: Optional Protocol to CRC). Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. Entry into force 12 February 2002. State Signatories: 128. State Parties: 141.

29 Article 1.

30 Article 2.

31 Article 3.

32 Article 4.

33 193 State parties. The USA and Somalia are the only UN member States who have not ratified the CRC.

34 Article 1, CRC.

The following issues are excluded from the scope of this thesis:

- Regardless of the conviction that children need to be protected in all situations, legal issues relating to children directly participating in hostilities³⁵ and children recruited in armed forces or groups will not be covered by this study. Extensive studies related specifically to the topic were already conducted.³⁶
- The distinction between international and non-international armed conflicts with regards to the analysis of protection of children in situations of attacks in IHL. Internal conflicts were for long perceived as an exclusive internal matter subject to the sovereignty of the state rather than subject to international regulation.³⁷ However, there is an increasing trend in international law to disregard the distinction between the IHL rules pertaining to IACs and NIACs. Some commentators view that this distinction “frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs”.³⁸ Others perceive it

³⁵ See supra fn.11.

³⁶ E.g. Goodwin-Gill, Guy and Ilene Cohn (1994), supra fn.19; and Machel Study, supra fn.4.

³⁷ Stewart, James G. Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict. In: *International Review of the Red Cross* No. 850 (June 2003) (Pp. 313-350) at pp. 316-317. Available at http://www.icrc.org/eng/assets/files/other/irrc_850_stewart.pdf. [10.05.2011]

³⁸ Reisman, W. Michael and Silk, J. Which law applies to the Afghan conflict? In: *American Journal of International Law*, Vol. 82. (1988). (Pp. 459-486) at p. 465: “The ‘distinction’ between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.”

as “arbitrary”,³⁹ while many consider it “undesirable”⁴⁰ and “difficult to justify.”⁴¹

The said dichotomy is losing its value with regards to the protection of civilians,⁴² which is the subject of this thesis. This is without prejudice to certain important differences with respects to the legal status of persons taking direct part in hostilities.

It may nevertheless be mentioned that, the merging between IAC and NIAC of the IHL rules relating to the conduct of hostilities is somewhat more complex and affects the interplay between IHL and IHRL rules.

Although a situation may amount to a NIAC, the civilian population is frequently covered by the IHRL regime,⁴³ IHRL obligations on the State towards its citizens are to be respected, save on legally permissible derogation grounds. IHRL provides a higher level of protection than IHL for the persons under the territorial State’s control. Whereas, in IAC situations, a belligerent party is primarily bound by IHL rules vis-à-vis the enemy civilians when they are in its

39 See Dupuy, Rene Jean and Leonetti, Antoine. “La notion de conflit armé à caractère non international.” In: (A. Cassese ed.) *The New Humanitarian Law of Armed Conflict*. Editoriale scientifica. (Naples 1979). (PP. 258-276). P. 258: “Elle produit une dichotomie arbitraire entre les conflits, puisque la distinction, purement formelle, ne se fonde pas sur une observation objective de la réalité [...]”.

40 Detter, I. *The Law of War*. London 2002. P. 49: “It is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflict.”

41 Warbrick, C. and Rowe, P. *The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadić case*. In: *International and Comparative Law Quarterly* Vol. 45. (1996). (Pp. 691-701) at p. 698.

42 Tadić Case, ICTY supra fn.17, paras 96-97.

43 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall Advisory Opinion), Advisory Opinion of 9 July 2004, International Court of Justice (ICJ) Rep. 2004, paras 102–114; the Case Concerning Armed Activities on the Territory of the Congo (Congo Case), Judgment, 19 December 2005, ICJ Rep. 2005, para 216; and Loizidou v. Turkey, Preliminary Objections, (Series A no. 310), European Court of Human Rights (ECtHR), Judgment of 23 March 1995, paras 63–64.

hands. The application and interplay of IHL and IHRL rules is then different in these two situations.

While the IAC / NIAC dichotomy introduces another level of analysis, the issue will not be subject to particular focus in the course of this study, since its scope does not allow to go into the details of this complex issue. The focus shall rather be on the protection of the child as such, who should not be caught in the complex relationship between the belligerent parties and ought to be protected as such.

- The focus in this study will rather be on the responsibilities of the attacking party rather than the legal obligations of the defender party to the conflict.

1.6 Methodology and sources

The study will examine *lex lata* on the protection of children in armed conflicts under the different legal paradigms and apply the relevant rules to cases of attacks on targets involving children.

The relevant treaty and customary rules, judicial decisions and legal scholarly writings are used in the course of the research.

The legal sources shall be dealt with in accordance with article 38 of the Statute of the International Court of Justice (ICJ) and the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT), namely article 31.⁴⁴

⁴⁴ Vienna Convention on the Law of Treaties (VCLT), adopted on 22 May 1969; entered into force on 27 January 1980; it was ratified by 111 States as of November 2010; those that have not ratified it yet may still recognize it as binding upon them in as much as it is a restatement of customary law.

1.7 Structure

Chapter two will start by exploring the existing IHL rules on general protection of civilians and special protections granted particularly to children during armed conflicts.

In light of the IHL regime, the third chapter will assess the legality of launching attacks on targets involving children by applying the existing rules on the truck scenario and other situations of attack.

Chapter four will examine parallel legal paradigms, other than IHL, applicable to children during armed conflicts. The focus will be on the human rights of children during the conduct of hostilities, namely the right to life, in an attempt to seek additional guidelines and legal norms discerning the lack of clarity in the existing IHL rules with regards to attacks on targets involving children. Throughout the examination of the IHL, IHRL and ICL *lex lata*, the research will focus on the treatment of children as a distinct group.

CHAPTER TWO

2. Lex Lata on the protection of children in International Humanitarian Law

2.1 Introduction

Children, as part of the civilian population enjoy a host of protections under IHL. The main relevant treaty provisions are found in the 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War (GCIV),⁴⁵ the Convention (III) relative to the Treatment of Prisoners of War (GCIII),⁴⁶ the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API)⁴⁷ and to a lesser extent in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII).⁴⁸ Other treaties governing the use of weapons in armed conflicts also provide for such protections to an extent.⁴⁹ Furthermore, customary international law contains a wide range of protections for the civilian population and children in particular.

⁴⁵ Supra fn.14.

⁴⁶ Supra fn. 14.

⁴⁷ Supra fn. 17.

⁴⁸ Supra fn. 13.

⁴⁹ E.g. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to CCW). Geneva, 10 October 1980. Entry into force: 02.12.1983. State parties: 94. State Signatories: 1; and Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively

Some IHL rules deal exclusively with the protection of children, treating them as a distinct group, where they enjoy 'special protection'. Some of these protections are extended to them through their mothers, i.e. expectant mothers and mothers of children under seven. Other protections concern children under 15.⁵⁰

The present chapter will explore general and special relevant rules pertaining to children caught in situations of armed conflict.

2.2 Special protection for children as a distinct group in IHL

2.2.1 Treaty law

The following section will explore the relevant IHL instruments granting children special protection. The discussion is to a certain extent instrument based in order to highlight the weight and relevance each treaty accords to child protection.

Firstly, GCIV, which relates to the protection of civilians in international armed conflicts and military occupation. The convention provides for different categories of protection to children during armed conflict according to their age and the nature of their presence in the conflict area. General protections are granted to populations against certain consequences of war. This category includes expectant mothers who enjoy particular protection and respect.⁵¹

Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980. (CCW). Entered into force on 02.12.1983. State parties:114. State Signatories: 5.

⁵¹ Article 16, GCIV.

Other protections are concerned with children under the age of seven and children under fifteen; e.g. measures to ensure their welfare⁵², the permission of free passage of food and medical supplies⁵³ and the non-separation from their families.⁵⁴ In the event of such separation, measures must be taken to ensure that they are not left to their own resources and that their education and exercise of religion are facilitated in all circumstances.⁵⁵

As aliens in the territory of a party to the conflict, children under the age of 15 years old, pregnant women and mothers of children under seven years must benefit from any preferential treatment to the same extent as the nationals of the State concerned.⁵⁶

In occupied territories, the occupying power may not compel civilian children to work,⁵⁷ nor can it enforce death penalty on them.⁵⁸ The power in control also has general obligations to facilitate the child's education and care⁵⁹ in addition to ensuring the free passage of all consignments of essential foodstuffs and clothing for children under the age of fifteen.⁶⁰ Age considerations are to be taken in account in the case of the detainment of minors.⁶¹ Special protection exists for children through the non-separation

52 Ibid., article 24.

53 Ibid., article 23.

54 Ibid., articles 25 and 26.

55 Ibid., article 24.

56 Ibid., article 38.

57 Ibid., article 51.

58 Ibid., article 68.

59 Ibid., article 50.

60 Ibid., article 23.

61 Ibid., article 76.

of families during their deportations, transfers, and evacuations.⁶² GCIV also provides for the respect of children's rights to education⁶³ and ensures their provision of health care⁶⁴ in the different situations while caught in armed conflicts.

It has been argued that the "Fourth Geneva Convention does not state as a principle that special protection should be given to children".⁶⁵ However, a range of its provisions do stipulate for preferential treatment to be granted to them.

Secondly, turning to GCIII, which concerns the treatment of prisoners of war, children are also covered by the treaty. When children are in the custody of an enemy party, age considerations are to be taken into account when utilizing Prisoners of War (POW) for labour.⁶⁶ The treaty allows for preferential treatment of children POW as an exception to the rule on equal treatment. This exception is based on age considerations, among other criteria.⁶⁷

However, GCIII does not seem to impose any type of preferential treatment on the detaining authority vis-à-vis children, whereas GCIV and API include

62 Ibid., article 49; more general obligations in this concern, see *ibid.*, article 17 on removal of children from besieged or encircled areas; article 74, API on reunion of dispersed families and article 78, API on the evacuation of children.

63 Ibid., article 24, On children's education, see also article 50, GCIV (in occupied territories) and 94 (on children's education and welfare in internment places).

64 Ibid., article 14, On protections for maternity cases, see articles 18, 21 and 23, GCIV. See also Article 91, GCIV in case of internment.

65 Plattner, Denise. Protection of Children in International Humanitarian Law. *International Review of the Red Cross*, No. 240 (30-06-1984). Available at <http://www.icrc.org/eng/resources/documents/misc/57jmat.htm>

66 Article 49, GCIII.

67 Ibid., article 16 states that POW should be treated equally "without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria". However, it takes into consideration "the provisions of GCIII relating to rank and sex of POW, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications."

a host of rules regulating the conditions of children placed in internment or their presence in internment places (i.e. dependent on internees), as the case may be, in order to ensure their safety and well being.⁶⁸

Thirdly, API, which deals with international armed conflicts,⁶⁹ provides for a wide range of 'indirect' protection' by asserting that "wounded" and "sick" also cover expectant mothers, maternity cases and new-born babies.⁷⁰ In addition, API dedicates two articles to the protection of children specifically. Article 77 provides that 'special respect' should be given to them⁷¹ and that they must be protected against any form of indecent assault. More importantly, it imposes on belligerent parties the obligation to refrain from recruiting children below the age of 15 years. If this is not the case, such children continue to benefit from the special protection accorded by the provision, whether or not they are prisoners of war. In cases where they are arrested, detained or interned for reasons related to the armed conflict, they are to be protected under certain circumstances.⁷² It's worth underlining the unrestricted scope of application of this Article, since it applies to 'all children' in the conflict area, whether affected or not by the conflict.⁷³ Article 78 safeguards the rights of children in cases of evacuation under compelling reasons related to their health or safety with a view to facilitating their return to their families and country. It also provides for a right to education.

68 See articles 81, 82, 85, 89, 91, 94, 119, 127 and 132, GVIV; articles 77(3) and (4), API.

69 Article 1(4), API.

70 Article 8. See also Ibid., article 76 which provides for the protection of pregnant women and mothers having dependent infants in case of detainment and against the execution of death penalty.

71 Ibid., article 77(1): "children shall be the object of special respect."

72 Article 77(4) provides that children must be held in quarters separate from the quarters of adults, except where families are accommodated as family units.

73 Commentary to article 77, API states: "This article is not subject to any restrictions as regards its scope of application; it therefore applies to all children who are in the territory of States at war, whether or not they are affected by the conflict".

Para 3177.

The execution of the death penalty on persons below 18 years when the offence (which must be related to the armed conflict) was committed, is prohibited.⁷⁴

Besides the preferential treatment accorded to children under API, the convention establishes the principle of special protection to children and addresses the issue of their direct participation in hostilities.

Fourthly, APII, which deals with non-international armed conflicts,⁷⁵ seems to provide a higher level of protection as regards the death penalty in the case of children. Article 6(4) goes beyond the prohibition of the execution of the said punishment; it prohibits even pronouncing death penalty on children.⁷⁶

On the other hand, APII reiterates certain special protections granted to children in armed conflicts. It protects their rights to education,⁷⁷ non-separation from their families,⁷⁸ in evacuation conditions,⁷⁹ besides the obligation not to recruit those under 15 years old and not allowing them to directly participate in hostilities.⁸⁰ The aforementioned special protection continues to apply even in the event of their direct participation in hostilities.⁸¹

⁷⁴ Article 77(5), API.

⁷⁵ Article 1, APII.

⁷⁶ Combatants under 18 in IAC are eligible for POW status whenever they are in the custody of an enemy party, thus protected by GCIII. However, persons below the age of 18 engaging in hostilities during NIAC are not eligible to POW status in their own State, thus not protected by GCIII. They are subject to the national legal system. The higher standard set in APII in this regard is a reflection of the greater influence of IHRL during NIAC.

⁷⁷ Article 4(3)(a), APII.

⁷⁸ Ibid., article 4(3)(b).

⁷⁹ Ibid., article 4(3)(e).

⁸⁰ Ibid., article 4(3)(c).

⁸¹ Ibid., article 4(3)(d).

APII is largely a replica of the core human rights obligations by the State towards its citizens.

Finally, turning to international legal instruments regulating the means of warfare, while conventions related to use of certain weapons in warfare are concerned with the protection of civilians in general, the 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the CCW)⁸² specifically prohibits the use of booby-traps associated with "children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children".⁸³

The evolution from the 1949 Geneva Conventions to the 1977 API and the 1980 Protocol II to CCW (partly illustrated by the prohibitions on engaging children in hostilities,⁸⁴ the incorporation of provisions exclusively dealing with children⁸⁵ and the absence of age limits regarding preferential treatment)⁸⁶ reflects the increased awareness of the need to address children's needs as a distinct group under IHL.

Nevertheless, while international treaties recognize and address a number of the special needs of children caught in areas of armed conflict, these instruments do not touch upon particular protections to be accorded to them in situations of attack.

⁸² Supra fn. 49.

⁸³ Article 6(1)(b)(v) of Protocol II to CCW.

⁸⁴ Article 77, API

⁸⁵ Ibid. and Article 6(1)(b)(v) of Protocol II to CCW.

⁸⁶ The only exception in setting an age limit is in article 77, API comes with regards to the prohibitions on engaging children in hostilities and recruiting them in the armed forces.

2.2.2 Customary international law

While IHL treaty law distinguishes between situations arising in IAC and NIAC, customary international humanitarian law extends the protections granted to civilians to cover both types of conflicts to a certain extent mostly concerning the rules of protection.

Observers hold the view that the Geneva Conventions are declaratory of customary international law,⁸⁷ while the ICJ maintains that this is true in some respects, since they reflect the ‘fundamental general principles of humanitarian law’.⁸⁸ In addition, provisions of API related to the protection of the human person are perceived as customary rules.⁸⁹ Hence, rules reflected in these conventions shall not be reexamined in the present section.

Besides the protections granted to civilians in general, customary international humanitarian law provides for specific rules concerning children.

Customary international humanitarian law includes provisions which entitle children in armed conflicts to special respect and protection in both NIAC and IAC situations.⁹⁰ Children must neither be recruited into armed forces or armed groups,⁹¹ nor allowed to take part in hostilities.⁹² Furthermore, customary rules regulate children’s internment conditions with regards to

⁸⁷ Meron, Theodor. Human rights and humanitarian norms as customary law. (Oxford 1989). P 8.

⁸⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986. ICJ REP. 14, Judgment of June 27, para 218.

⁸⁹ Commentary to API, P.628, para 1993.

⁹⁰ Rule 135, ICRC study.

⁹¹ Ibid., rule 136.

⁹² Ibid., rule 137.

their separation from adults except their families.⁹³ In case of displacement, all possible measures must be taken to ensure satisfactory conditions of children's shelter, hygiene, health, safety and nutrition and non-separation of family members.⁹⁴

Although wide-ranging and treats children as a distinct group, the 'special protections' regime under existing IHL does not cover any special protection for children in situations of attacks.

2.3 General qualified protection of children from attacks as part of the civilian population in IHL

The following section will explore treaty and customary rules on the protection children, as part of the civilian population, when caught in areas of armed conflicts.

2.3.1 The principle of distinction

This "cardinal principle"⁹⁵ is one of the "intransgressible" rules of customary international humanitarian law⁹⁶ and is based on the distinction between individual civilians, the civilian population and combatants⁹⁷ and between civilian objects and military objectives.⁹⁸ It is already implicitly mentioned in the Declaration Renouncing the Use, in Time of War, of Explosive

⁹³ Ibid., rule 120.

⁹⁴ Ibid., rule 131.

⁹⁵ Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 8 July 1996. (Nuclear Weapons Advisory Opinion) ICJ Reports 1996. para. 78.

⁹⁶ Ibid., para 179.

⁹⁷ Article 48 and 51(2), API; Rule 1, ICRC study.

⁹⁸ Article 48 and 52(2), API ; Rule 7, ICRC study.

Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.⁹⁹ Although the principle was not explicitly mentioned in the 1907 Convention (IV) respecting the Laws and Customs of War on Land and its annex (Hague Regulations),¹⁰⁰ article 25 prohibits “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”.

During IAC, civilians comprise of all persons who are not combatants;¹⁰¹ and combatants must distinguish themselves from the civilian population.¹⁰² In NIAC, there is no legal definition of the status groups. However the distinction principle still applies. Consequently, attacks against the civilian population as such are prohibited.¹⁰³ The same applies to attacks against individual civilians as long as they do not directly participate in hostilities.¹⁰⁴ Deliberate attacks on them are unlawful, even if they confer a military advantage.¹⁰⁵

The willful violation of the principle of distinction is a grave breach under API¹⁰⁶ and constitutes a war crime both in situations of IAC¹⁰⁷ and NIAC.¹⁰⁸

99 Preamble, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November 1868. (St. Petersburg Declaration), entered into force on 11.12.1868.

100 Supra fn. 13.

101 Article 50 read with Article 43, API; article 4(1),(2),(3) and (6), GCIII and rule 5, ICRC study.

102 Article 44(3), API.

103 article 13(2), APII and rule 1 ICRC study.

104 Article 51(3), API; article 13(3), APII and rule 6, ICRC study.

105 Gasser, Hans-Peter. “Negotiating the Protocols: Was It a Waste of Time?” In: (Astrid Dellissen et al. eds.) *Humanitarian Law of Armed Conflict: Challenges Ahead*. (London, 1991). (Pp. 81-92) at p.82.

106 Article 85(3)(a), API.

107 Article 8(2)(b)(i), Rome Statute.

108 Ibid., article 8(2)(e)(i).

Furthermore, according to the principle of distinction, it is prohibited to launch attacks against civilian objects.¹⁰⁹ Only military objectives¹¹⁰ can be lawfully targeted.¹¹¹ This protection, therefore ceases in cases where, and for such time as civilians are used for military purposes.¹¹² In case of doubt about the nature of an object, a careful assessment given the specific conditions of the situation is required “as to whether there are sufficient indications to warrant an attack.”¹¹³ A presumption of the civilian character of an object is provided for in case of uncertainty.¹¹⁴ Moreover, it is prohibited to launch attacks which treat as a single military objective several clearly separated and distinct military objectives located in concentrations of civilians or civilian objects.¹¹⁵

The duty to verify by all feasible means that a target is in fact a military objective¹¹⁶ is based on the rule of precautions in attacks, which aims at sparing civilians,¹¹⁷ through making the principle of distinction operational.

The principle of distinction is reflected in other rules of IHL concerning prohibitions on indiscriminate attacks. The use of weapons, which by their nature are indiscriminate, is prohibited.¹¹⁸ The same applies to attacks, which are not directed¹¹⁹ or cannot be directed¹²⁰ against a specific military

109 Article 52 (1), API; article 2(1), Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (Protocol III to the CCW). Geneva, 10 October 1980. Entered into force in: 02.12.1983. State Parties: 10; article 3(7), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II to the CCW), entered into force in 03.12.1998. State Parties: 97; and rule 7, ICRC study.

110 Article 52(2), API; and rule 8 ICRC study.

111 Articles 48 and 52(2), API and rule 7, ICRC study.

112 Article 52, API; and rule 10, ICRC study.

113 ICRC study. P. 36.

114 Article 52(3), API ; article 3(8)(a), Amended Protocol II to the CCW and rule 10, ICRC study.

115 Article 51(5)(a), API and rule 13, ICRC study.

116 Article 57(2)(a), API and rule 16, ICRC study.

117 Rule 15, ICRC study.

118 See article 3(3), Protocol II to the CCW; article 3(8), Amended Protocol II to the CCW and rule 71, ICRC study.

119 Article 51(4)(a), API and rule 12(a), ICRC study.

objective. Civilians are also protected against the effects of methods and means combat, which cannot be limited under IHL.¹²¹

The principle of distinction is also codified in treaties related to the means of warfare, for instance Protocol II to CCW,¹²² its 1996 Amended Protocol II,¹²³ its Protocol III¹²⁴ and in the preamble of the 1977 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.¹²⁵

The principle of distinction constitutes the basic foundation for children's protection, as part of the civilian population, against direct targeting and against attacks. Under the same principle, the protection accorded to civilian objects (where children usually are present; i.e. schools, homes and hospitals etc...) confers protection on children. However, there is no special obligation on the attacker party to take particular care to avoid launching an attack on a target involving children; they are treated in the same line as other civilians.

2.3.2 The Rule on Proportionality in Attack and Precautionary Measures

The principle of proportionality exists in several forms under international law. As a general principle of international law, proportionality is a means of

120 Article 51(4)(b), API and rule 12(b), ICRC study.

121 Article 51(4)(c), API and rule 12(c), ICRC study.

122 Article 3(2), Protocol II to CCW.

123 Article 3(7), Amended Protocol II to the CCW, supra fn.109.

124 Article 2(1), Protocol III to CCW, fn. 112.

125 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997. Entered into force on 1.3.1999. State Parties: 156. State Signatories: 2.

coordination between conflicting legal positions, aiming at achieving a fair balance between means and ends. In IHRL, proportionality serves as a criterion to balance the State's versus the individual's interests.

Turning to IHL, proportionality has different areas of application and different shapes.¹²⁶ In *jus ad bellum*,¹²⁷ it aims at regulating the resort to use of force by States by identifying the permissible grounds for such resort¹²⁸ and determining the intensity and magnitude of military action.¹²⁹ In *jus in bello*,¹³⁰ proportionality governs primarily the targeting process. This is referred to as the “rule of proportionality”, which serves to mitigate the absolute nature of the rule of distinction. The rule of proportionality also governs belligerent reprisals,¹³¹ which are “measures taken in the context of an existing armed conflict by one of the parties in response to unlawful conduct by an adversary”.¹³² These measures must be “proportionate to the violation against which they react.”¹³³ This proportionality concept is similar to the general rule of proportionality in international law.

For the purpose of this thesis, the discussion will be limited to the rule of proportionality in the context of targeting, i.e. that the expected collateral

126 See Henderson Ian. *Contemporary Law of Targeting: Military objectives, Proportionality and Precautions in Attack under Additional Protocol I*. (Leiden 2009). Pp. 180-183. And Meron, Theodor. *The Humanization of International Law*. (Leiden 2006). P. 61-62.

127 “*Jus ad bellum*” refers to the body of law concerning acceptable justifications to engage in war.

128 For more information on proportionality in *Jus ad Bellum*, see: Hensel, Howard M.. *The Law of Armed Conflict – Constraints on the Contemporary Use of Military Force*. (Aldershot 2005).

129 Cannizzaro, Enzo. Contextualizing Proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war. In: *International Review of the Red Cross*. Volume 88 Number 864. (December 2006). (Pp. 779-792) at p. 781.

130 “*Jus in bello*” refers to the body of law concerning the limits to acceptable wartime conduct.

131 for further discussion of belligerent reprisals, see section 3.3.

132 Greenwood, Christopher. “Reprisals and Reciprocity in the New Law of Armed Conflict.” In: (Michael Meyer eds.): *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*. (London 1989). (Pp. 227-250) at p. 227.

133 Cassese, Antonio. *International Law*. 2nd edition. (Oxford 2005), p.426.

damage of an attack on a military objective should not be excessive to the anticipated military advantage.¹³⁴ In the event that the expected damage to civilian persons or objects would be excessive in relation to the anticipated military advantage, the attack would be indiscriminate and therefore prohibited.¹³⁵ Some experts even consider causing expected disproportionate civilian casualties, loss or damage as 'equivalent to a direct attack', since the results are tantamount to those of deliberate attacks.¹³⁶

Therefore, the expected loss of civilian life and objects is not unlawful in IHL as long as it is proportional to the military advantage anticipated. Proportionality "is clearly not calculated according to the archaic *lex talionis* principle" especially when it involves human lives.¹³⁷ The resolution of the proportionality equation requires a determination of the relative value of the military advantage anticipated by one side and the expected civilian casualties or damage to civilian objectives of the opponent on the other side.¹³⁸

It follows that precautionary measures aim at minimizing the collateral damage.

Before launching attacks on military objectives, belligerent parties must make the proportionality analysis. In cases where it is apparent that such

134 Article 51(5)(b) and 57, API, Rule 18, ICRC study.

135 Article 51(5)(b), API and rule 14, ICRC study.

136 Fenrick, William J. Attacking the Enemy Civilian as a Punishable Offense. In: 7 Duke Journal of Comparative and International Law (1997). (Pp.539-567) at p. 561.

137 Sloane, Robert D. The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War. In: The Yale Journal of International Law; [Vol. 34: 47]. (2009). (Pp. 48-112) at p.99. Available at http://www.yale.edu/yjil/files_PDFs/vol34/Sloane.pdf

138 Fenrick (1997), fn.136, p. 501. For further discussion of the susceptibility of non-combatants to aerial bombardment, see: Oppenheim, L. International Law: A Treatise. In: Lauterpacht, H. LL.D eds., 7th edition. London 1952. Pp. 520-28.

an attack is disproportionate, the military commander is under the obligation to refrain from launching the attack,¹³⁹ and it must be cancelled or suspended.¹⁴⁰ This rule concerns those who plan an attack, the relevant decision makers and primarily those who execute it.¹⁴¹ In situations where visibility is unclear, greater caution is required.¹⁴²

In addition, all feasible precautions must be taken with regards to the choice of means and methods of warfare.¹⁴³ Whenever there is a choice among several military objectives aiming at gaining similar military advantage, there is an obligation to opt for the attack causing least danger to civilian lives and objects.¹⁴⁴

Children, as part of the civilian population enjoy a range of protections against disproportionate attacks.¹⁴⁵ However, no explicit provision provides particular protection to children, nor there is any explicit duty on a party to the conflict to take particular care when the civilians involved are children.

2.3.3 Protection to involuntary human shields

Children might be placed in the vicinity of a military objective, munitions could be hidden in places where they are present or persons engaging in military activities could mingle among them. This is done with a view to benefit from the non-combatant immunity enjoyed by civilians in order to

139 Article 57(2)(a)(iii), API.

140 Article 57(2)(b), API and rule 19, ICRC study.

141 Commentary on Article 57(2)(b), API para 2220.

142 Ibid., para 2221.

143 Article 57(2)(a)(ii), API and rule 17, ICRC study.

144 Article 57(3), API and rule 21, ICRC study.

145 art. 57, API.

shield potential military objectives liable to attack. Children are thus being used as human shields.

The obligations of the defender party relating to removing civilians from the vicinity of military objectives¹⁴⁶ and the prohibitions against using civilians as human shields are well established and clear under IHL.¹⁴⁷ This section will focus on the obligations of the attacking party vis-à-vis human shields.

IHL draws a distinction between the legal status of involuntary and voluntary human shields. Consequently, the question arises as to which category children used for shielding purposes belong? The answer will determine the protection bestowed on children used as human shields.

In reality, children -used as human shields- are mainly faced with two situations:

- a) Children accompanied by adults; e.g. parents. During the conduct of hostilities, adults often do not even realize that combatants are situated in the vicinity or, alternatively, do not have control over them, i.e. cannot force those combatants to leave the area, where they are present. On the other hand, and only in cases where there is enough time and space to react, attempting to run away with the children might increase the risk of being caught in the crossfire of either of the conflicting parties. The least ill option is usually to hide, or freeze wherever they are, until the end of a strike or combat round. It is worth mentioning that in many conflict areas, underground shelters are not available and that the accompanying civilian adults are not able to practically protect the children.

¹⁴⁶ Ibid., article 58.

¹⁴⁷ See article 51(7), API; rule 97, ICRC study: "The use of human shields is prohibited".

b) Children unaccompanied by adults. In this case, children are not necessarily able to comprehend the situation they are in: either that they are in the vicinity of military objectives or that they are being used as human shields. In addition, if they realize that they are in danger, they are presumed not to have the ability to adequately react to the danger they are facing.

It is frequently argued that children's lack of legal capacity negates the voluntary nature of their participation in shielding a military objective.¹⁴⁸ Consensual or voluntary shielding cannot be raised on account of their lack of knowledge of IHL rules, awareness and clear understanding of the circumstances around them and their inability to take appropriate decisions and act upon them in war situations.¹⁴⁹

Hence, children may be considered as involuntary human shields, when used for shielding military objectives by a party to the conflict.¹⁵⁰

Turning to the legal status of children used as involuntary human shields, the commentary on API clearly asserts that even if the placing of civilians within or in the vicinity of military objectives is intentional, the attacker remains under the obligation to take the precautionary measures provided for in Article 57.¹⁵¹

148 See Schmitt, Michael. Targeting and Humanitarian Law: Current Issues. In: 34 Israel Yearbook in Human Rights (2004). (Pp.59-104) at p. 96.

149 See Preamble, Resolution 14, adopted by the Council of Delegates of the International Red Cross and Red Crescent Movement in its Budapest session in November 1991, recognized that "persons under the age of eighteen years may not be sufficiently mature to understand the consequences of their actions, and to comply with international humanitarian law". Available at http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Jan-Feb-1992.pdf . [15.05.2011].

150 The scope of this study excludes children DPH as indicated in section 1.4.

151 Commentary to API. P. 628. Para 1990.

On the other hand, article 147 of GCIV provides that the willful killing of protected persons constitutes a grave breach of the Convention. It is asserted that using involuntary human shields is often equated with the taking of hostages,¹⁵² the execution of whom constitutes willful killing within the meaning of article 147 of GCIV.¹⁵³ However, it is uncertain whether such an execution is deemed as willful killing depends primarily on the identity of the perpetrator, i.e. *only* when the execution is committed by the hostage taker not by another party, in this case a member belonging to the defender party (and not the attacker party).

Nevertheless, military objectives in the vicinity of children remain liable to attack subject to the respect of the proportionality rule. There are four views on how the violations by the defender party influence the position of involuntary human shields in relation to the proportionality rule:¹⁵⁴

First position: involuntary human shields are not to be counted in the proportionality and precautions analysis, and thus do not affect the attacker's obligations. However, this view finds scant support in literature; civilians do not lose their protected status as a result of the wrongful acts of a party to the conflict.¹⁵⁵

Second position: involuntary human shields remain immune from direct attack, but are "discounted" when calculating incidental injury in the analysis of proportionality and precautions. When the defender party uses civilians to shield a military objective, this fact

152 ICRC study, P. 338.

153 Commentary to article 147 GCIV, p.597.

154 Schmitt, Michael. Human Shields In International Humanitarian Law. In Columbia Journal of Transnational Law Volume 47 issue 2. (2009). (Pp. 292-338) at Pp. 327-335: Schmitt asserts that there are three possibilities with regards to the situation of involuntary human shields and the proportionality analysis, then suggests a fourth approach.

155 Ibid., p. 327.

should be used for the benefit of the attacker and not the defender. It is argued that the rationale behind such a view aims at minimizing the risk of using civilians to evade attacks on lawful targets. To clarify this approach, Schmitt draws the analogy of the workers in munitions factory, who are not entitled to the full benefits of civilian status while at work.¹⁵⁶

Despite its limitations, the proportionality rule clearly indicates that collateral damage to civilians should be weighed against the anticipated military advantage. The rule does not further categorize civilian status (according to occupation or other criteria) nor does it exclude any category of civilians except those who directly participate in hostilities.

In addition, such an analogy practically ignores the cardinal rules of distinction and proportionality: involuntary human shields remain civilians eligible for their protected status under IHL and they fall within the definition of 'civilians' also in relation to the proportionality rule. Furthermore, the analogy fails to observe two important factors: knowledge and consent. Usually, munitions factory workers know about the risk they are facing by working in a military establishment and yet willingly decide to take up such occupation.¹⁵⁷

Although in many cases, civilian adults, used as involuntary human shields, would be aware of the surrounding situation, they would lack the consent element and frequently the ability to react in such situations. However, this view cannot be applicable to inadvertent or unwitting children who lack both important factors. This should be taken into consideration when it comes to

¹⁵⁶ Ibid., p. 331

¹⁵⁷ If the consent element is not present, further analysis of the situation would be necessary.

proportionality tests related to attacks on targets involving children as involuntary human shields.

To illustrate the importance of the ‘awareness’ or ‘knowledge’ factor in addition to the ‘ability to react to situations of danger’, an analogy can be drawn to the case of mentally disabled persons. Their probable unawareness of the surrounding circumstances and their special vulnerability ought to be taken into account in the formulation of protective rules. It should be highlighted that in this case, issues of distinction might be more complex unless their location is clearly identifiable; i.e. they are present in a clearly marked institution.

Turning to the rationale behind such a view, it seems logical that it aims at minimizing the risk of using civilians to evade attacks on lawful targets. However it fails to consider a significant deterrent factor: the party using civilians as human shields is in breach of its legal obligations.¹⁵⁸ In IAC, the shielding party would be committing war crimes.¹⁵⁹ In assessing its immediate military advantage, a belligerent party will take into account that its shielding acts constitute a considerable disadvantage in the long term. Denying shielding activities is not easily tenable when placing children within or in the vicinity of military objectives.

Finally, while this view focuses primarily on the interests of the belligerent parties, it ignores to a large extent a central purpose of IHL, namely the protection of civilians from the atrocities of warfare. In other words, the focus in the discussed view is on the standpoints of the conflicting parties, rather than on the interest of the victims in the event of attack.

¹⁵⁸ Article 51(7), API; rule 97, ICRC study.

¹⁵⁹ Article 8(2)(b) (xxiii), Rome Statute.

Third position: Schmitt suggests an approach which reconciles different views: while counting involuntary human shields fully as civilians in the proportionality analysis, in cases of uncertainty about the conformance of an attack with proportionality rule (i.e. whether the attack is proportional or not) an attacker would be entitled to launch the strike.¹⁶⁰

However, such an approach renders the principle of proportionality even more ineffective and vulnerable to abuse than it is due to its ill-defined limits.¹⁶¹ In cases where the rule is violated, certain alleged facts could be “adjusted” according to the interests of the violating party. In addition, this view strengthens the subjective element in the proportionality assessment, when there is an increasing need for more objective criteria.

Fourth position: As civilians, involuntary human shields are entitled to the full benefits of their IHL protections against the effects of hostilities. An opponent's unlawful conduct may not be grounds for the disregarding of civilians' legal protection rules.

This view is inline with article 51.8 of API, which does not release a party facing human shields from its legal obligations relevant to targeting. In addition, civilians are not deprived of their civilian status by the presence of military objectives within the civilian population.¹⁶² Thus, involuntary human shields factor fully into proportionality and precautions assessments. This

¹⁶⁰ Schmitt (2009), fn. 154, p.332.

¹⁶¹ See section 3.4 ‘Critique to proportionality rule’.

¹⁶² Article 50(3), API.

approach seems to find support to a certain extent in legal literature.¹⁶³ Human Rights Watch takes a similar position and extends it to cover voluntary human shields too.¹⁶⁴

Furthermore, this approach is arguably¹⁶⁵ in conformity with the rule on non-application of the principle of reciprocity when it comes to rules concerned with the protection of the human person.¹⁶⁶ This is consistent with art. 60(5) of the VCLT ruling out the suspension of a treaty for wrongful conduct of a party in the case of provisions concerned with the protection of the human person.¹⁶⁷

This assertion is also in line with the rule, which stipulates that the obligation to respect and ensure respect for IHL does not depend on reciprocity, as found in treaty and customary law.¹⁶⁸ While the defender party is in breach of its legal obligations by using civilians as human shields, this cannot justify violations of the laws regarding distinction and proportionality rules by the attacking party.

163 Bouchié de Belle, Stephanie. Chained to cannons or wearing targets on their t-shirts: human shields in international humanitarian law. In: International Review of the Red Cross Volume 90 Number 872. (December 2008). (Pp. 883-906) at p.901; and the ICRC "Interpretive Guidance" on Direct Participation in Hostilities Under International Humanitarian Law; which restricts the view on extreme cases, where the involuntary human shields are either forced or unaware of their shielding activity. P. 1027

164 Human Rights Watch, Briefing Paper: International Humanitarian Law Issues in a Potential War in Iraq. 20 February 2003. P.3. Available at <http://www.hrw.org/en/reports/2003/02/20/international-humanitarian-law-issues-potential-war-iraq>

165 It is argued that the rule on non-application of the principle of reciprocity when it comes to IHL does not cover rules on the conduct of hostilities; i.e. a belligerent party can attack enemy civilians if the opponent is doing so against the other party's nationals.

166 E.g.: art. 51(8), API: '[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians.'

167 Bouchié de Belle (2008), supra fn. 163, p.899.

168 Rule 140, ICRC study; See also common Articles 1 and 3, GCs on respecting and ensuring respect of conventions "in all circumstances".

The rules on the protection of children used as involuntary human shields are interrelated with the proportionality analysis and do not treat children in situations of attack as a distinct group.

2.4 Concluding remarks

Article 77 of API stipulates that children shall be the 'object of special respect'. International law has so far acknowledged the special needs of some vulnerable groups and has granted special status for children as a distinct group under IHL. However, the 'special protection' regime does not cover situations of conduct of hostilities.

Turning to general protections accorded to all civilians, the principle of distinction establishes the foundation of legal protection to civilians. Children are covered by the same rules applicable to other civilians. However, these rules are qualified; the legality of attacks on targets involving children is subject to the proportionality rule.

While the proportionality related calculations are widely debated in relation to human shields, it would be essential to assess not only whether the lives of children should be included in the proportionality test, but also whether, and to what extent the proportionality rule, in its existing methods of application and interpretation, grants them concrete protection.¹⁶⁹

¹⁶⁹ See section 3.4 "Critique of the proportionality rule".

CHAPTER THREE

3. Application and assessment of rules of International Humanitarian Law

3.1. Introduction

In order to evaluate the existing rules on the protection of children under IHL, the present chapter will examine their applicability to the following cases as an illustration of instances where attacks mostly occur on children during armed conflicts.

3.2 Cases for analysis

The following cases shall be studied:

- A. Deliberate attacks on children: The children are neither within nor in the vicinity of a military objective. They are attacked as such, i.e. intentionally causing injury or loss of children's lives.
- B. Combatants mingle or hide military objectives (e.g. munitions) next to, or within civilian objects; e.g. schools or any other areas, among or near children. The attack is on a civilian object containing military objectives; i.e. knowingly causing injury or loss of children's lives. Two possible situations arise in this case:
 - (i) The knowing injury or loss of children's lives is intentional, where the attacker intends to indiscriminately destroy the whole target,

including the civilian children.

(ii) The knowing injury or loss of children's lives is unintentional, where the attacker intends to destroy specifically the military objectives inside the civilian object and the civilian loss of life -as a result of the attack- although foreseeable is unintended.

C. Children are within or in the vicinity of a military objective. The attack is targeted at a military objective and the children's death is a result of collateral damage; i.e. incidentally caused loss of civilian lives.

3.3 Application of International Humanitarian Law rules to situations of attack

In situation A, where the children are neither within nor in the vicinity of a military objective, the prohibition of deliberate attacks and the distinction principle provide clear protection against the targeting of children as part of the civilian population.¹⁷⁰ Such deliberate attacks constitute war crimes in IAC¹⁷¹ and NIAC¹⁷² and a grave breach of API in IAC.¹⁷³

Turning to situations B and C, one question that arises is that of reprisals. "Reprisals are measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered as lawful in the particular conditions under which they are carried out".¹⁷⁴

¹⁷⁰ Article 51(2) and article 13(2), APII.

¹⁷¹ Article 8(2)(b)(i), Rome Statute.

¹⁷² Ibid., 8(2)(e)(i).

¹⁷³ Article 85(3)(a), API.

¹⁷⁴ Commentary to article 33 GCIV, p.227.

Would attacking an objective knowingly causing the loss of civilian lives constitute a reprisal in response to the illegality of actions by the party using these children as human shields¹⁷⁵ or by placing them in the vicinity of a military objective?¹⁷⁶

Historically, traditional customary law allowed for reprisals against the civilian population,¹⁷⁷ the 1949 GCIV prohibited them against civilians in occupied territories.¹⁷⁸ Subsequently, the 1977 API completely banned attacks against the civilian population or civilians by way of reprisals.¹⁷⁹ This prohibition was largely debated¹⁸⁰ and is still not acceptable by some States.¹⁸¹

However, the intent behind such attacks needs to be proven in each case in order to establish that the reprisal aims at attacking civilians. Without evidence of the intention to attack civilians, it is uncertain whether such attacks are ‘measures contrary to law’ in the first place to fall under the reprisal definition. In case such attacks cause disproportionate loss to the anticipated military advantage, they would be unlawful and hence come within the scope of ‘measures contrary to law’ under the definition of reprisals.

In addition, it might be argued that the violations committed by the defender party towards its *own* children (by using them for shielding purposes) do not constitute a basis for triggering the belligerent reprisals mechanism. Nevertheless, the use by a party to the conflict of its own children to shield

¹⁷⁵ Article 51(7), API.

¹⁷⁶ Ibid., article 58(a).

¹⁷⁷ Kalshoven, F. *Belligerent Reprisals*. Second edition. (Leiden 2005). Pp.353-361.

¹⁷⁸ Article 33, GCIV.

¹⁷⁹ Article 51(6), API.

¹⁸⁰ Oerter (1998), fn.17 at p. 235.

¹⁸¹ E.g. the US, see US Naval Manual (1997), para. 6.2.3.

military objectives is indeed a breach of IHL rules and belligerent reprisals against civilians are prohibited under IHL rules.¹⁸²

Focusing on situation B, where combatants mingle or hide military objectives (e.g. munitions) in civilian objects; i.e. schools or any other areas among children, the following IHL rules are to be considered in cases (i) and (ii):

(i) In cases of foreseeable and intended loss of civilian life, where the attack is launched on the target as a whole, without care being taken to spare the civilian population.

Firstly, it is difficult to distinguish between the latter case and cases where the attacker does intend to attack civilians. The attacker's intention may be inferred from the means and methods employed in the attack and whether he sought to destroy mainly the military objective, or not.¹⁸³

Secondly, one legal view asserts that the term "incidental" bears a notion of unpredictability; i.e. damage must never be intended, even if proportionate to the importance of the military target.¹⁸⁴ To read the rule on precautions in attacks as "an authorization to the warring parties to **intentionally** produce proportionate damage to the civilian population and their property" [emphasis added] would constitute a twisting of provision 57, API.¹⁸⁵ This view is in line with article 57 (5), API which states, that 'no provision of this article may be construed as authorizing any attacks against the civilian

¹⁸² Article 51(6), API.

¹⁸³ Further examination of the elements of the crime regarding the mental element would be necessary in making such an appraisal.

¹⁸⁴ Nuclear Weapons Advisory Opinion (1996). ICJ Rep 226, Dissenting Opinion of Judge Higgins. P.366. Para 22.

¹⁸⁵ Benvenuti, Pablo. The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia. In: European Journal of International Law. Vol 12, no.3, (2001). (Pp 503-529). P.509.

population, civilians or civilian objects.’ Benvenuti argues that even an intentional proportionate damage would not be permissible if it could have been avoided.¹⁸⁶ This view corresponds to the obligation on belligerent parties to choose the military objective which may be expected to cause least danger to civilian lives and objects.¹⁸⁷ Nevertheless, the latter rule is restricted to cases where several military objectives for obtaining a similar military advantage are available and whether the attacking party has the possibility of choice between the different targets.¹⁸⁸

Thirdly, the presence of non-civilian individuals within the civilian population does not deny the civilian character of the population.¹⁸⁹ An attack would be indiscriminate if it is not directed against a specific military objective, employing means and methods which cannot be directed at a specific military objective or whose effects cannot be limited as required by IHL.¹⁹⁰ Such attacks are prohibited under IHL.¹⁹¹ As Doswald-Beck put it,¹⁹² the ICJ equated the indiscriminate attack to a direct attack on civilians in the Nuclear Weapons Advisory Opinion.¹⁹³

Fourthly, since targeting can be conducted only at military objectives, then all other objects are immune from attack.¹⁹⁴ In situations where there is uncertainty regarding the nature of an object, there is a mandatory

¹⁸⁶ Ibid.

¹⁸⁷ Article 57(3), API.

¹⁸⁸ Ibid., article 57(3).

¹⁸⁹ Ibid., article 50(3).

¹⁹⁰ Ibid., article 51(4).

¹⁹¹ Ibid., article 51(4).

¹⁹² Doswald-Beck, Louise. International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality or the Threat or Use of Nuclear Weapons. In: International Review of the Red Cross No. 316, 35 (1997). (Pp. 35-55) at p. 38.

¹⁹³ Nuclear Weapons Advisory Opinion, fn. 95, p. 259 para. 78.

¹⁹⁴ Schmitt (2004), fn. 148, p.97.

presumption in favor of immunity.¹⁹⁵ If there is a clear indication that a civilian object is being used for military purposes, it forfeits such immunity.¹⁹⁶

Fifthly, willful killing and willfully causing great suffering or serious injury to body or health to protected persons under GCIV is a grave breach of the Convention.¹⁹⁷ However, the Commentaries to the Geneva Conventions stipulate that “cases in which protected persons are killed as a result of acts of war -- for example, the bombardment of a civilian hospital -- are more difficult to class as willful killing: the question is left open.”¹⁹⁸

Nevertheless, an attack on a military objective in a civilian object (for example a school or hospital) causing an *intentional* loss of civilian life and employing indiscriminate means and methods would be indiscriminate, thus prohibited under IHL.

(ii) In cases of foreseeable and unintended loss of civilian life as a result of attack (situation B(ii)), the attacker seeks to destroy the military objective and the civilian loss of life occurs as an unintended result of the attack.

Such an attack would be lawful if it is directed against the military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective. The effects of the attacks must be limited according to IHL rules; even after those conditions are fulfilled,

¹⁹⁵ Article 52 (3), API.

¹⁹⁶ Ibid., article 52 (2).

¹⁹⁷ Article 147.

¹⁹⁸ Commentary to article 147 GCIV, p.597.

the attack should not breach the proportionality rule.¹⁹⁹ In other words, children in this case are used as involuntary human shields and the military objectives remain liable to attack subject to the limitations of the proportionality rule.²⁰⁰

The same applies to situation C, where children are within or in the vicinity of a military objective. For instance, launching an attack on a truck carrying weapons and children; the truck constitutes a military objective,²⁰¹ the presence of children on the same truck does not render the latter an illegal target.²⁰² The truck is still liable to attack, subject to the rule on proportionality, i.e. as long as the incidental death of civilians is proportionate to the anticipated military advantage.

In both situations B(ii) and C, where the attacker does not intend to launch an attack on the children, the word ‘incidental’ in the proportionality analysis is more adequate to the context. The proportionality assessment is necessary and precautionary measures are to be considered. The rule relating to the cancellation or suspension of attacks, because they are expected to be disproportionate,²⁰³ is an attempt to safeguard civilian lives, even when the defender party does not respect the required measures of protection with regard to them.²⁰⁴ In other words, the lack of intention to target civilians does not absolve the attacker party from the obligation to

199 See Commentary to article 51(5)(b), API. Para 1979.

200 See further analysis of the proportionality rule in section 3.4.

201 Article 52(2), API.

210 De Mulinen, Frédéric. *Manuel sur le droit de la guerre pour les forces armées*. Published by the International Committee of the Red Cross. (Geneva 1989). P. 14. para. 56.

203 Article 57(2)(b), API.

204 Commentary on API, para 1991.

take all feasible precautions with a view to ‘avoiding’ or in any event ‘minimizing’ the loss of civilian lives or injury to civilians.²⁰⁵

Deliberate attacks on children (situation A) are in breach of the principle of distinction. Knowingly and intentionally destroying a target, containing children, as a whole (situation B(i)), constitutes an indiscriminate attack. Belligerent reprisals remain controversial and hard to prove in each case. In situations B(ii) and C, where the death of children is unintentional, the legality of the attack must be assessed in light of the proportionality rule applicable to all civilians. A critical appraisal of the proportionality rule will be discussed in the next section.

It is worth underlining that throughout the application of IHL rules to the above cases, no provisions provide children in situations of attack with particular or special protection.

3.4 Critique of the proportionality rule

As discussed above, in cases where the attack is launched against a specific military objective and where it is expected that incidental damage to civilians or civilian objects will be caused, a proportionality analysis must be undertaken before launching an attack. Thus, “the proportionality rule affects the decision whether to attack a military objective not whether an object is a military objective.”²⁰⁶

In reference to the truck scenario or situation B (ii) (knowingly but unintentionally causing loss of civilian lives), an important question is

²⁰⁵ Article 57(2)(a)(iii).

²⁰⁶ Henderson (2009), fn. 126, p.198.

raised: to what extent is the loss of life considered in fact incidental, if there is a clear indication of the presence of children in the truck? This question can only be answered adequately after examining the factual circumstances after the incident has taken place and assessing the damage incurred thereof in order to confirm the intention of the attacker.

Moreover, in relation to both situations B(ii) and C (incidentally caused loss of civilian lives, where the attacker's intention is primarily to destroy the military objective), further questions are raised:

How many children may be killed for the attacker not to be found in violation of the proportionality rule? How is the weight of the anticipated military advantage assessed in relation to the civilian loss? What and how are the relative values assigned to 'military advantage' and 'civilian damage'? What is included in the total sum? What is excessive? To what extent do knowledge and intention factor in the equation? In order to verify the legality of launching an attack, an adequate appraisal of proportionality in each case must be undertaken by answering the above questions.

The ICTY prosecution underlined the great difficulty in evaluating proportionality when weighing human lives in the proportionality balance.²⁰⁷ Judges McDonald and Vohrah considered it as "another way of referring to the utilitarian approach of weighing the balance of harms [...] when it comes to human lives having to be weighed and when the law must determine [...] that one life or a set of lives is more valuable than another."²⁰⁸

207 Erdemović (Appeal), (case no IT-96-22-A), ICTY AC, 7 October 1997, Appeals Transcript, 26 May 1997. Pp. 84-85. Available at <http://www.icty.org/x/cases/erdemovic/trans/en/970526IT.htm>.

208 Erdemović (Appeal), (case no IT-96-22-A), ICTY AC, 7 October 1997, Joint and Separate Opinion of Judge McDonald and Judge Vohrah 1997, para 81.

On the other hand, there are so far no set criteria related to the ‘anticipated military advantage’ in the test in question. Were the military advantage criteria well defined under IHL, attacking a military target involving children would be permissible in IHL only under clear and well-set conditions. In cases of uncertainty regarding the fulfillment of such ‘presumed’ conditions, and in order to counterbalance the anticipated military advantage from an attack, the attacking party would have to consider other military options to reach its objective.

In practice, a party to the conflict often resorts to blaming its opponent for using shielding activities as means of justifying its attacks on targets including civilians.²⁰⁹ At that point, unless the damage is clearly disproportionate, given the absence of strict legal criteria for an ‘acceptable’ anticipated military advantage in the context of the proportionality rule, an attacking party has a substantial margin for a subjective evaluation of its own expected military advantage. The flexibility of the proportionality rule can constitute a tool for abuse and a means of proving the legality of ‘subjectively assessed’ attacks. After all, the presence of children within a military objective does not render the latter immune from attack; the attacking party may claim that the anticipated military advantage is so vital that the damage to civilians is not excessive in a given situation.

Another issue to be raised here is related to investigating cases of violations of the proportionality rule. Such investigations would normally take place after the end of the investigated event and preliminarily by the violating state.²¹⁰ Here issues of objectivity in weighing up the

209 E.g. Gaza incident, *supra* fn.10.

210 According to the principle of subsidiarity in international criminal law, the forum State has priority in investigating alleged crimes by the exercise of territorial jurisdiction. Under certain conditions (lack of will or ability by the forum State

proportionality balance are in question. Besides the possibilities where belligerent parties can try to 'justify' their "anticipated military advantage", to what extent can one guarantee that the relevant facts would not be 're-adjusted' to fit within the legal frame of the ill-defined rule?

Furthermore, to what extent does authorizing the launch of attacks on targets involving children by applying the proportionality rule, even under stringent conditions, lead to the collapse of the distinction principle, given the space offered to conflicting parties to maneuver and abuse the proportionality rule.

Dill summarizes the flaws of proportionality in IHL; firstly, the rule fails to set a standard for results of combat operations by prescribing how an actor should intend to employ means with regard to ends; thus focusing on the 'intended' rather than the 'actual' collateral damage. Secondly, it does not specify a mechanism of how two dissimilar values, human life and military advantage, should be weighed against each other. Subsequently, the existing rule fails to guide the military, since it relies on an essentially subjective and personal assessment due to the lack of a transparent and stable set of criteria to determine what is considered proportionate. Consequently, the rule fails to arbitrate due to the same interpretive uncertainties reflected in intense international controversy. As a result of the indeterminacies of the law, the application of the proportionality rule in

to genuinely investigate the case), other parties or international tribunals may take over. This does not preclude other forms of jurisdiction, such as the protective principle, the universality principle, active and passive personality principle. See Rynjaert, Cedric. *Jurisdiction in International Law*. Oxford 2008. (Pp.85-133).

practice becomes complicated, which renders its effectiveness in protecting civilians questionable.²¹¹

In many instances where there has been substantial loss of civilian lives, it is uncertain whether it was due to the inadequacy of the existing proportionality rule or the failure of belligerent parties to adhere to it.²¹² The failure to abide by the rule could either result from a party's unwillingness to do so or its inadequate subjective assessment as to what is permissible under the proportionality rule.

Finally, one cannot find a clear-cut answer to the above question based on an objective and well-defined set of criteria. Therefore, several IHL experts maintain that the details of this principle need to be more concretely clarified than they have been to date.²¹³

Since many aspects of the proportionality rule remain vague,²¹⁴ and many questions are unanswered,²¹⁵ children are practically left at the discretion of the attacker at the time of attack. In addition, the proportionality rule does not include any particular considerations when the civilians involved in the assessment are children, nor does it assign a special or particular weight to the loss of children's lives.

211 Dill, Janina. Applying the Principle of Proportionality in Combat Operations. Policy Briefing. Oxford Institute For Ethics, Law, And Armed Conflict. Oxford December (2010). P.2-5.

212 Ibid., p.4. The author draws the example of "Operation Cast Lead" in winter 2008/2009 by arguing that it is controversial whether the Gaza humanitarian catastrophe was a result of a violation of the principle of proportionality or whether the law was in fact adhered to.

213 E.g. Fenrick (1997), fn.136, pp.545-46.

214 Dill (2010), fn 211, p.2.

215 See also Sloane (2009), fn 137, p.111.

3.5 Concluding remarks

Given the uncertainties regarding the proportionality rule and the lack of strict or well-defined criteria, it is not clear under current IHL rules, how unanswered questions regarding attacks on targets involving children can be resolved.

An examination of other normative frameworks which also apply might serve in answering these questions.

CHAPTER FOUR

4. Protection of children under other legal paradigms

4.1 Introduction

As a general rule of treaty interpretation, article 31.3.c of the VCLT states that in interpreting a given treaty, "any relevant rules of international law applicable in the relations between the parties shall be taken into account." Hence, other relevant rules of International Human rights law (IHRL) and International Criminal Law (ICL) must be examined. This chapter will examine how different legal paradigms apply and interrelate with regards to the protection of children during the conduct of hostilities. Then, it shall explore the special measures of protection and the right to life as incorporated in general IHRL instruments. Subsequently, the right to life under the CRC shall be discussed. The point is to examine whether children are given special protection in light of other rules during the conduct of hostilities.

4.2 International Human Rights Law

4.2.1 Applicability, interrelation and methodology

Traditionally, the view was that human rights treaties apply only in peacetime and are restricted to the treatment by a State of its own

population.²¹⁶ This view is still upheld by some States.²¹⁷ Currently, the most dominant view stipulates that “fundamental human rights [...] continue to apply fully in situations of armed conflict.”²¹⁸

Although distinct, both IHL and IHRL regimes have “the protection of the integrity of the human person” as one of their major goals,²¹⁹ sharing a “common core of fundamental non-derogable rights”.²²⁰ Thus, IHL and IHRL influence and reinforce each other,²²¹ which results in increasing the effective protection of civilians caught in situations of armed conflicts.²²²

This interrelation is evidenced by the reference of international tribunals to IHRL norms in their proceedings related to situations of armed conflict.²²³ Moreover, IHRL treaties do not exclude such application, although some

216 Provost, René. *International Human Rights and Humanitarian Law*. Series: Cambridge Studies in International and Comparative Law No. 22. (Cambridge 2002). Pp.2-7.

217 Walsh, Patrick. *Fighting for Human Rights: The Application of Human Rights Treaties To United States' Military Operations*. In: 28 Penn State International Law Review 45. (Summer 2009). (Pp. 45-81) at p. 48: “[T]he United States disagrees with the proposition that international human rights treaties apply extraterritorially and during armed conflicts.”. According to same source at p. 63, Israel maintains the same position.

218 UN General Assembly, Res. 2675 (XXV), 9 December 1970 (adopted by 109 votes in favour, none against and 8 abstentions), para 1.

219 Provost (2002), fn. 216, p.2; and Robertson, Arthur Henri. “Humanitarian Law and Human Rights.” In: (Christophe Swinarski eds.). *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*. (Geneva/The Hague: ICRC/Nijhoff, 1984). (Pp. 793-802). P 793.

220 *Prosecutor v. Delalic*, (Case No. IT-96-21-A), ICTY AC, Appeals Judgment on 20 February 2001, para. 149; *Juan Carlos Abella (Argentina)* (Case 11.137), IACHR Report No. 55-97, 18 November 1997, para. 158.

221 Meron (2006), supra fn. 126, p.4.

222 See Draper, G. I. A. D. *The Relationship Between the Human Rights Regime and the Law of Armed Conflict*. In: *Proceedings of the International Conference on Humanitarian Law – San Remo*, 24–27 Sept. 1970. Grassi: Istituto Editoriale Ticinese. (1970). (Pp.141-145); UN Doc. A/8052 (1970): *Report of the Secretary-General on Respect for Human Rights in Armed Conflict*. P.13 para. 28.

223 E.g.: *Prosecutor v. Anto Furundzija*, (Case No. IT-95-17/1-T), ICTY Trial Chamber, Trial Judgement of 10 December 1998, Para 170: The court referred to the lack of provisions related to the prohibition on rape in IHRL instruments, it referred to provisions safeguarding physical integrity as implicitly prohibiting rape; and *Prosecutor v. Dragoljub Kunarac et al.* (Case Nos. IT-96 -23-T and IT-96-23/1-T) (ICTY Trial Chamber), Judgement of 22 February 2001, paras. 466-467: The court referred to IHRL instruments to define the crime of torture..

rights are derogable in situations of public emergency²²⁴ and subject to certain conditions.²²⁵

The ICJ also confirmed that IHRL is applicable in armed conflicts.²²⁶ Furthermore, the ICRC Study concluded that “[t]here is extensive State practice to the effect that human rights law must be applied during armed conflicts.”²²⁷

The United Nations Security Council (UNSC) has also issued several resolutions affirming the need for full respect for human rights in areas of armed conflicts.²²⁸

Turning to the interrelation between the two paradigms, the problems arising from their simultaneous application during armed conflict must be solved by reference to the principle ‘lex specialis derogat legi generali’,²²⁹ which means that the rule closer and more specific to a particular subject matter prevails over the more general rule and hence applies to that certain context.²³⁰ Sassoli and Olson maintain that there are different views regarding the criteria for choosing the lex specialis rule applicable to a given situation:²³¹

224 e.g. Article 4(1), ICCPR; article 15(1), ECHR.

225 e.g. article 4(3), ICCPR; article 15(1) and (3), ECHR.

226 Nuclear Weapons Advisory Opinion, fn. 95, paras 24, 25; and Wall Advisory Opinion, supra fn. 43, p.178, para 106.

227 ICRC Study. P. 303.

228 E.g.: Preamble, UNSC Res. 237(1967); UNSC Res.1589(2005), P.10; preamble, UNSC Res.1723(2006).

229 Nuclear Weapons Advisory Opinion, fn. 95, para. 106; Congo case, fn. 43, paras. 216–220.

230 Koskeniemi, Martti. Fragmentation of international law : difficulties arising from the diversification and expansion of international law.

Report of the Study Group of the International Law Commission. UN Doc A/CN.4/L.682. (13 April 2006). Para 60.

231 Sassoli, Marco and Olson, Laura M. The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts. In: International Review of the Red Cross 90 (871) (September 2008). (Pp. 599 – 627) pp.603-604.

- a) Applying the most just rule; this approach involves a too subjective view, which is dangerous since it leads to irreversible results.
- b) Considering the teleological criterion. This approach also allows for personal preferences.²³²
- c) Applying the rule which has the larger 'common contact surface area' with the specific situation in question.²³³

After determining the *lex specialis*, the *lex generalis* still remains present in the background and is taken into account when interpreting the *lex specialis*.²³⁴

The *lex generalis* would contain other rules of international law to be taken into account according to article 31(3)(c) of the VCLT. In cases of conflict of interpretation between two norms, there should be a constant attempt to harmonize them.²³⁵

This approach is useful in clarifying matters, which are not clearly regulated under *lex specialis* rules, as it is the case in the present study with regards to the protection of children against attacks. In case it is assumed that IHL operates as *lex specialis* when dealing with an attack causing the death of children, IHRL must then step in to fill the gap.²³⁶ The best solution would be not to apply solely either one of the two branches of law, but rather to opt for a complementary approach. This is not to be understood in a 'conflation' sense, since the two regimes are distinct from the outset.

232 Jenks, Wilfred. The conflict of law-making treaties. In: British Yearbook of International Law, Vol. 30 (1953). (Pp. 401-453) at p. 450.

233 Term was used by Walker, Mary Ellen in Marco Sassoli's IHL course, see Sassoli and Olson (2008), fn. 231, p. 604 (at footnote 13).

234 Ibid., p.605

235 Koskeniemi (2006), supra fn. 230, paras. 31, 37

236 See Sassoli and Olson (2008), supra fn. 231, p. 621.

Consequently, applying IHL rules concerning the protection of children does not preclude the corresponding parallel application of IHRL.²³⁷ Thus, if the application of the latter is required to provide further details about IHL regulation regarding an attack on a target involving children, consistent with the maxim of *lex specialis*, reference to IHRL may help in clarifying the relevant legal obligations.

While admitting the complexity of questions of formal requirements relating to legal and practical difficulties when defining the human rights obligations of a given State acting outside its territories (especially criteria of ‘control’ for the establishment of ‘extraterritorial jurisdiction’),²³⁸ there exists an increasing trend against the limited reach of human rights instruments. It seems to be unclear on what basis States should not respect their legal obligations in their sovereign actions abroad including their military operations, by virtue of their control over their military decisions.

Nevertheless, it cannot be asserted that there is a consensus on the necessary conditions to establish extraterritorial jurisdiction, to hold a State responsible for human rights violations while acting abroad. During IAC, the conduct of hostilities concerns persons over whom the attacker most commonly does not exercise ‘control’ in the strict sense of IHRL sense.

237 See UN Doc. CCPR/C/21/Rev.1/Add.13: Human Rights Committee, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on states parties to the ICCPR (Art. 2) , para. 11 (26 May 2004)..

238 On the requisite conditions for control to establish extraterritorial application of human rights, compare the ECtHR ruling in *Issa et al. v Turkey*, Judgment (16 November 2004) Paras.69-74, where the test is of “effective overall control” either exercised directly or through armed forces, a State might exercise temporarily effective overall control of the territory where it conducts military operations; and *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)* (hereinafter *Ecuador Colombia Case*), Report No. 112/10, Inter-State Petition IP-02, Inter-American Court of Human Rights (hereinafter *IACtHR*), Admissibility, 21 October 2010, para 99, requesting a causal nexus between the extraterritorial conduct and the alleged violation.

While the extraterritorial application of IHRL instruments remains controversial, the aim of exploring IHRL norms in this study is an attempt to discern the lack of clarity in the existing IHL rules with regards to attacks on targets involving children.

4.2.2 Special protection for children in general international Human Rights Law instruments

General IHRL protections concern ‘everyone’ within the territory or under the jurisdiction of States parties, including children. General protections are provided for in the International Covenant on Civil and Political Rights (ICCPR),²³⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁴⁰ and the Universal Declaration of Human Rights (UDHR).²⁴¹ Certain provisions are concerned specifically with children rights and entitle them to special treatment.

Although not binding as a legal instrument such as treaties, the UDHR was adopted without any objections.²⁴² It reflects States’ main concerns regarding human rights. The Declaration entitles children to special care without any discrimination.²⁴³

239 Articles 14, 18, 23, 24, the International Covenant on Civil and Political Rights (hereinafter ICCPR); adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

240 Articles 10, article 12(2)(a) and article 13(3), the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), adopted by General Assembly, resolution 2200A (XXI) of 16 December 1966; entered into force on 3 January 1976.

241 Article 25(2), Universal Declaration of Human Rights (hereinafter UDHR) 10 December 1948: “Motherhood and childhood are entitled to special care and assistance”.

242 UDHR was adopted by 48 votes to none with 8 abstentions.

243 Article 25(2).

The ICCPR also takes into consideration children's interests, namely in cases of marriage dissolution,²⁴⁴ proceedings concerning matrimonial disputes or guardianship issues²⁴⁵ and protecting their education rights.²⁴⁶ Child's rights to such measures of protection are acquired by his status as a minor without any kind of discrimination.²⁴⁷

Turning to the ICESCR, art 10(3) provides for special measures of protection and assistance to all children without any discrimination. They should be protected from economic and social exploitation, and work harmful to their morals, health, or dangerous to life, or likely to hamper their normal development. State parties should set age limits below which the paid employment of child labour should be prohibited and punishable by law. States parties are bound by minimum guarantees with regards to children's education²⁴⁸ and health.²⁴⁹

In addition, it is often maintained that human rights violations of children are particularly serious,²⁵⁰ a view asserted by the Inter-American Court. It stresses the "gravity of violating human rights of a person who by his/her condition is placed in a position of vulnerability vis-à-vis adults [...]".²⁵¹ The principle was reasserted in other cases.²⁵² In determining the aggravated

244 Article 23 (4).

245 Article 14(1).

246 Article 18.

247 Article 24.

248 Article 13.

249 Article 12(2)(a).

250 Feria Tina, Monica. *The Landmark rulings of the Inter-American Court of Human Rights*. (Leiden 2008). Pp. 32-33.

251 Villagràn Morales et al. v. Guatemala; judgement of 19 November 1999(Merits). Para.146.

252 E.g. Yean and Bosico children v. Dominican Republic (Series C No. 130) IACtHR, Judgment of 8 September 2005, para 134: "cases in which the victims of human rights violations are children are particularly serious". Available at <http://www1.umn.edu/humanrts/iachr/C/130-ing.html>.

responsibility of the State, the Court took into account the fact that the victims against whom the violations were directed were children.²⁵³

The above paragraphs illustrate the recognition of the special needs and vulnerability of children. Consequently, IHRL treats children as a distinct group entitled to special measures of protection.

4.2.2.1 Right to life as a general protection under IHRL

The fundamental right to life constitutes an essential condition for the enjoyment of the range of protections under international law. The Human Rights Committee held that it is “basic to all human rights.”²⁵⁴ It is enshrined in several IHRL instruments.²⁵⁵

While there seems to be a consensus on its customary nature,²⁵⁶ some commentators argue that the right to life has acquired the status of a peremptory norm of general international law.²⁵⁷ Although this right is non derogable under several human rights instruments,²⁵⁸ the European Convention for the Protection of Human Rights and Fundamental Freedom

253 Feria (2008), *supra* fn. 250, pp.32-33.

254 Human Rights Committee General Comment 14, p.17, para1.

255 Article 3, UDHR; article 6, ICCPR; article 6, CRC.

256 E.g., Hannikainen, Lauri. *Peremptory Norms (Jus Cogens) in International Law*. (Helsinki 1988), p.436; Kuper (1997), fn.1, p.117; and Meron (1989), *supra* fn. 87, pp.193-4.

257 Dinstein, Yoram. “The Right to life, Physical Integrity, and Liberty.” In: (Louis Henkin eds.) *The International Bill of Rights: The Covenant on Civil and Political Rights*. (New York 1981). (Pp 114-137). P. 114; and Nowak, M. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (N.P. Engel) Second edition. (Kehl 2005). P.105.

258 Article 6(1) read with article 4(2), ICCPR; see also: article 4(1) read with article 27(2), American Convention on Human Rights 1969 (Pact of San José, Costa Rica) prohibits suspension even in time of war of article 19 (on rights of the child) and article 4 on right to life.

(hereinafter ECHR) allows for derogation in cases of deaths resulting from lawful acts of war.²⁵⁹

On the other hand, under the ICCPR, the formulation of this right is intertwined with the phrase “not to be arbitrarily deprived of life”.²⁶⁰ Most human rights instruments do not specify when a killing is deemed arbitrary.²⁶¹ This vagueness is intentional in order to allow for a wide interpretation and subsequently a wide latitude for the protection against deprivation of this right.²⁶² The term ‘arbitrary’ is at times interpreted as not only ‘illegally’ but also ‘unjustly’.²⁶³

The ICJ in the Nuclear Weapons Advisory Opinion asserts that the test of what is an arbitrary deprivation of life is to be determined by the applicable *lex specialis* –IHL- designed to regulate the conduct of hostilities.²⁶⁴

Accordingly, the deprivation of life is not always unlawful; e.g. when it respects IHL rules. Thus, when assessing an attack on a target causing the death of children, the interpretation of whether such deprivation of life is ‘arbitrary’ or not is subject to IHL rules operating as *lex specialis*.

However, another view stipulates that the Nuclear Weapons ruling should not be interpreted narrowly, maintaining that this ruling does not mean that the right to life must be exclusively interpreted in light of that *lex*

259 Article 2, read with article 15(2), European Convention for the Protection of Human Rights and Fundamental Freedom, 4 November 1950. (ECHR) entered into force on 3 September 1953.

260 E.g. article 6 (1), ICCPR.

261 Sassoli and Olson (2008), fn. 231, p. 610

262 Weissbrodt, D. “Protecting the Right to Life: International Measures Against Arbitrary or Summary Killings by Governments.” In: (B.G. Ramcharan eds.) *The Right To Life In International Law*. (Dordrecht 1985). (Pp. 297-314). Pp. 297- 298.

263 UN DOC. A/2929, ChapterVI: Civil and Political Rights, para3. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NG9/000/20/PDF/NG900020.pdf?OpenElement>.

264 Nuclear Weapons Advisory Opinion, fn. 95, p.240. para 25

specialis.²⁶⁵ The said dictum should not be misunderstood.²⁶⁶ It has to be read in the context of the opinion in which the “ICJ had to determine the legality in abstracto of the use of a certain weapon”,²⁶⁷ namely the nuclear weapon.

Concerning the relationship between IHRL and IHL in situations of armed conflict, the ICJ enumerated three possible solutions:

“some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”²⁶⁸

The Court’s reasoning reflects the reinterpretation of IHL with an emphasis on promoting humanitarian considerations.²⁶⁹ This also conforms to the trend towards the growing relevance of human rights in time of armed conflict and the complementarity between IHL and IHRL.²⁷⁰ Nevertheless, the ICJ reiterated the Nuclear Weapons test in the Wall Advisory Opinion,²⁷¹ while the question raised before the court did not concern nuclear weapons.

If children’s right to life under general IHRL – operating as *lex generalis* – were absolute, this would have been reflected in IHL as *lex specialis*. However, *qua lex lata*, the deprivation of a child’s life, as a result of a lawful act of war, is not arbitrary, thus not unlawful.

265 See Gowlland-Debbas, Vera. The Relevance of Paragraph 25 of the ICJ’s Advisory Opinion On Nuclear Weapons. 98 American Society of International Law Proceedings 358; proceeding of the Ninety-Eighth Annual Meeting of the American Society of International Law Human Right and Humanitarian Law. (March 31-April 3, 2004). (Pp.358-363) at p.362.

266 Nuclear Weapons Advisory Opinion, *supra* fn. 95, para. 25.

267 Sassoli and Olson (2008), fn. 231, p. 613.

268 Nuclear Weapons Advisory Opinion, *supra* fn. 95, para106.

269 Dale, Stephens. Human Rights And Armed Conflict -The Advisory Opinion Of The International Court of Justice In The Nuclear Weapons Case. Yale Human Rights and Development Law Journal; Volume 4. (2001) (Pp.1-33) at p.15.

270 Gowlland-Debbas (2004), *supra* fn. 265, p. 363

271 Wall Advisory Opinion, fn. 43, para105.

4.2.3 Special Protection for children in the Convention on the Rights of the Child

The CRC and its first Optional Protocol are focal instruments specifically concerned with children rights. The latter is primarily concerned with the issue of children recruited in armed forces or armed groups and includes specific provisions addressing their direct participation in hostilities²⁷² and prohibiting their compulsory recruitment.²⁷³ It further condemns attacks on children in situations of armed conflict and direct attacks on places where children are generally significantly present, such as schools and hospitals.²⁷⁴

The CRC, considers that children under international law are capable of "enjoying the benefits of specific rights and freedoms."²⁷⁵ Children's rights are non derogable under the CRC. Furthermore, in the preparatory works, delegations recognized that children who live in "exceptionally difficult" situations need special consideration.²⁷⁶

272 article 1, First Optional Protocol to CRC.

273 Article 2.

274 Preamble, First Optional Protocol to CRC.

275 Van Bueren, Geraldine. *The International Law on the Rights of the Child*. (Dordrecht 1995). P. 12.

276 UN DOC. E/CN.4/1988/28: Report of the working group on a draft convention on the rights of the child. Commission
On Human Rights 6 April 1988. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G88/122/84/PDF/G8812284.pdf?OpenElement>, para 10 and Preamble, CRC.

4.2.3.1 Right to life and the 'best interests' of the child under the CRC

Listed as a priority right before other rights in the CRC,²⁷⁷ article 6 is an unqualified provision stating that children have an 'inherent right to life'. The wording of the provision does not provide for exceptions nor suggests the 'arbitrariness' requirement to the prohibition on deprivation of life. Yet, it is uncertain whether it can be inferred that any deprivation of such right would be automatically arbitrary in the case of children, although the prohibition against imposing capital punishment on children²⁷⁸ might be an indication in that direction.

Moreover, article 3 of the CRC states that in all actions concerning children, State parties have an obligation to give primary consideration to the best interests of the child.²⁷⁹ Article 4 stipulates that its protected rights are to be safeguarded by all appropriate legislative, administrative, and other measures. It follows that every institution within a State party to CRC is required to systematically assess the consequences of its actions or decisions on children, taking into consideration the best interest principle.²⁸⁰ Moreover, the application of the CRC obligations should not be subject to discrimination of any kind.²⁸¹ Among the discrimination criteria are the national and ethnic status, meaning that the rights of children from different origins should also be respected as long as they are within the jurisdiction of a certain State.²⁸²

²⁷⁷ Ibid., para 21.

²⁷⁸ Article 37(a), CRC; and article 6(5), ICCPR.

²⁷⁹ Article 3, CRC.

²⁸⁰ UN Doc. CRC/GC/2003/5: General Comment No. 5. Committee on the Rights of the Child. Thirty-fourth session 19 September-3 October 2003.P.4.

²⁸¹ Article 2(1), CRC.

²⁸² Ibid., article 2.

Although the extraterritorial application of human rights instruments is controversial, the ICJ confirmed the extraterritorial application of the CRC provisions in cases where a State exercises jurisdiction.²⁸³ Whereas this confirms the obligation to respect and ensure respect of the CRC during NIAC and in occupied territories, the situation is different during IAC, where the requisite elements for establishing the exercise of jurisdiction might be debated.²⁸⁴

Prima facie, in cases where the exercise of jurisdiction is established, it seems to be intricate to tolerate permitting within the national legal system of a given State, attacks on targets causing children's loss of life during the conduct of hostilities by its armed forces, thus depriving them of their inherent right to life.

However, article 38, CRC provides for the respect and ensuring the respect for the relevant IHL rules applicable to children in armed conflicts. Hence, the deprivation of their inherent right to life during the conduct of hostilities may be justified by reliance on the interpretation of IHL rules, which remain unclear.²⁸⁵

On the other hand, and in cases of attacks on targets involving children, if IHL as *lex specialis* is to be informed by *lex generalis* (IHRL), this will allow for providing particular care to children during the conduct of hostilities. The best interests of the child might infer a narrow application of the ill-defined proportionality rule. Higher threshold of application implies a

²⁸³ Wall Advisory Opinion, *supra* fn. 43, para 113.

²⁸⁴ Compare the ICJ ruling of the Wall Advisory Opinion, *supra* fn. 43, (para 112) establishing that Israel exercised "effective control" on the Occupied Palestinian Territories, hence exercised jurisdiction; and Ecuador Colombia Case, fn. 238, para99.

²⁸⁵ See section 3.5.

stricter definition of military advantage, for instance requiring an imperative military necessity, or requiring that the anticipated military advantage to be achieved through a certain attack can clearly and absolutely not be delayed or reached through other means.

It would be then less complex to classify the bombardment of a civilian object involving children, as to whether it constitutes willful killing or not within the meaning of article 147, GCIV after the examination of the relevant facts. This would solve the ambiguity raised by the Commentary to article 147, GCIV, where it stated that the bombardment of a civilian hospital is “more difficult to class as willful killing: the question is left open.”²⁸⁶

The best interests provision might be read as suggesting a broader interpretation of the right to life under the CRC by excluding any lawfulness of its deprivation in the case of children even in situations of armed conflict.

Furthermore, the prohibition against adverse distinction, the recognition of the special status of children in international law and their particular vulnerability in situations of armed conflicts, and the trend towards more respect of human rights in situations of armed conflict, suggest a broader reading of the Convention’s rules and scope of application to include acts of war committed by a State party on foreign territories, since such acts are committed by State agents acting under its authority.²⁸⁷

Nonetheless, these premises do not represent the current legal position on the question. So far, whether the right to life is absolute in the case of a child is so far not thoroughly debated; neither is the influence of a broader interpretation of the best interests of the child on IHL rules. Hence, no consensus on the matter can be drawn; with the result that children can be

²⁸⁶ Commentary to article 147 GCIV, p.597.

²⁸⁷ See Ecuador Colombia Case, fn. 238, para 99.

lawfully deprived of their right to life under existing law subject to the relevant IHL rules.

4.3 Protection of children under International Criminal Law

Besides the rules related to all civilians including children, International Criminal Law includes provisions particularly concerned with children. The Rome Statute preamble recognizes that during last century millions of children have been “victims of unimaginable atrocities that deeply shock the conscience of humanity.”²⁸⁸ It adopts one of the definitions of the crime of Genocide from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:²⁸⁹ the forcible transfer of children of a national, ethnical, racial or religious group to another group if committed with the intent to destroy, in whole or in part the former group as such.²⁹⁰ It prohibits the trafficking of children as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.²⁹¹ Among the definition of war crimes is the conscription or enlistment of children under 15 and engaging them in hostilities both in IACs²⁹² and NIACs.²⁹³

288 Preamble, Rome Statute.

289 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Adopted by the United General Assembly on 9 December 1948 as General Assembly Resolution 260. Entered into force on 12 January 1951. State Parties: 140. State Signatories: 41.

290 Article 6, Rome Statute ; article 2, Genocide Convention.

291 Article 7(2)(b), Rome Statute.

292 Article 8(2)(b) (xxvi), Rome Statute.

293 Ibid., article 8(2)(e) (vii).

The Rome Statute is the first international instrument crystallizing the international individual criminal responsibility of those committing child-specific crimes during armed conflicts.²⁹⁴

The Treaty stipulates how children must be treated during criminal proceedings, e.g.: when dealing with cases involving children, special considerations are made in the selection of judges²⁹⁵ and advisers,²⁹⁶ the prosecutor shall respect the interests and personal circumstances of victims and witnesses particularly in crimes involving violence against children.²⁹⁷ An exception to the obligation to hold hearings in public can be made in such cases.²⁹⁸ The Court does not have jurisdiction over children under 18 at the time of the alleged commission of a crime.²⁹⁹

Article 21 of the Statute stipulates that the Court's application and interpretation of the law must be consistent with the recognized human rights. Hence, the CRC and other international instruments pertaining to children's rights are essential when dealing with cases involving children.

Although children are treated as a distinct group in ICL, the Rome statute does not grant them 'special' protection in situations of attack: they are treated as part of the civilian population and enjoy the same protection.

294 Chamberlain, Cynthia. "Children and the International Criminal Court." In: (Noelle Quénivet and Shilan Shah-Davis eds.) *International Law and Armed Conflict, Challenges in the 21st Century*. (The Hague 2010). (Pp. 245-261). P. 245.

295 Ibid., article 8(b).

296 Ibid., article 9.

297 Ibid., article 54(1)(b).

298 Ibid., article 68(1).

299 Ibid., article 26.

4.4 Concluding remarks

By virtue of specialized IHRL instruments concerned exclusively with children rights and other provisions incorporated within IHRL and ICL general instruments, children are entitled to and in fact are granted special treatment as a distinct group under international law. However, such protections do not appear to provide for higher protection against the launching of attacks on targets involving children.

Qua lex lata, as a general human right applicable to all persons under the jurisdiction of a State, the right to life during armed conflict is subject to the interpretation of IHL rules operating as *lex specialis*. In other words, IHRL takes us back to the ill-defined rules of IHL concerning children in situations of attack. On the other hand, the examination of the right to life under the CRC indicates that it remains unclear whether a child's right to life - owing to its formulation under the convention and the best interests principle- is better safeguarded in situations of armed conflict.

It might be argued that, by virtue of the complementary approach, IHL as *lex specialis* can be informed by *lex generalis* and provide special protection to children in situations of attack. This would be possible if *lex generalis* rules provided for higher level of protection to children in situations of attacks. However, this is not the case for the relevant *lex generalis* rules.

CHAPTER FIVE

5. Conclusion

The particular vulnerability of children results in them being treated as a distinct group by different international law regimes. In wartime, children are accorded a range of protection rules under IHL which aim to address their needs.

However, these protection rules do not specifically cover situations of attack on targets involving children. If we return to the truck scenario, we find that the children are caught within the complex relationship between the belligerent parties. They are abused by the defender party, who allows them to be in a situation which exposes them to the risk of death or permanent disability. Their final destiny will depend on the decision of the attacker party - either to withhold, or to launch the attack; either to let the defender party gain an immediate military advantage, or to deny it the opportunity to do so.

While there is a clear cut IHL regime defining the obligations of the defender party, and the resulting penal sanctions in cases of violations, the attacker's obligations, and the repercussions thereof, remain imprecise. Questions relating to the limits of the proportionality rule, military necessity and involuntary human shields remain unanswered. This allows parties to the conflict a larger margin for subjective assessment. The ambiguity in the

existing legal regime pertaining to the protection of children renders it prone to abuse.

In the middle of these indeterminacies, the children on the truck and other children in similar situations should not be left to the mercies of the belligerent parties. Children cannot, and should not, have to pay the price for being put at risk by the defender party.

Children in conflict areas are dying every day. These children are not just numbers. The current legal regime protecting children in situations of attack needs to be re-examined. There is a need to frame child sensitive IHL rules and shift the focus from the rights and duties of the conflicting parties to the children's best interests. The solution should be pragmatic; it must maintain the balance necessary for the viability of IHL with an awareness of the increasing potential to abuse children. Child sensitive protection rules need to be formulated, in order to reduce the threats facing them in such attack situations to the maximum extent possible.

"In considering the future of children, we must be daring. We must look beyond what seems immediately possible and find new ways and new solutions."³⁰⁰

³⁰⁰ Machel Study, *supra* fn. 4, para 312.

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